U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 25 January 2007

Case No. 2005-BLA-5996

In the Matter of:
M.S. [1]
Claimant,

v.

BLEDSOE COAL CORP.,
Employer,
and
AMERICAN INTERNATIONAL SOUTH INSURANCE,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

BEFORE: THOMAS F. PHALEN, JR.
Administrative Law Judge

APPEARANCES:
Monica Rice-Smith, Esq.,
On behalf of Claimant

Timothy J. Walker, Esq.
On behalf of Employer/Carrier

DECISION AND ORDER – DENIAL OF BENEFITS

[1] The Department of Labor has directed the Office of Administrative Law Judges, the Benefits Review Board, and the Employee Compensation Appeals Board to cease use of the name of the claimant and claimant family members in any document appearing on a Department of Labor web site starting prospectively on August 1, 2006, and to insert initials of such claimant/parties in the place of those proper names. This order only applies to cases arising under the Black Lung Benefits Act, the Longshore and Harbor Workers' Compensation Act, and FECA. In support of this policy change, DOL has directed submission of a proposed rule change to 20 C.F.R. Section 725.477, proposing the omission of the requirement that decisions and orders of Administrative Law Judges contain the claimant/parties' initials only, to avoid unwanted publicity of those claimants on the web, and has installed software that prevents entry of the full names of claimant parties on final decisions and related orders. I strongly object to that policy change for reasons stated by several United States Courts of Appeal prohibiting such anonymous designations in discrimination legal actions, such as *Doe v. Frank,* 951 F. 2d 320 (11th Cir. 1992) and

This is a decision and order arising out of a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, ("the Act") and the regulations thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.[2]

On June 1, 2005, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a hearing. (DX 26).[3] A formal hearing on this matter was conducted on July 25, 2006 in Hazard, Kentucky by the undersigned Administrative Law Judge. All parties were afforded the opportunity to call and to examine and cross examine witnesses, and to present evidence, as provided in the Act and the above referenced regulations.

ISSUES[4]

The issues in this case are:

1. Whether the Miner has pneumoconiosis as defined by the Act;

2. Whether the Miner's pneumoconiosis arose out of coal mine employment;

3. Whether the Miner is totally disabled; and

4. Whether the Miner's disability is due to pneumoconiosis.

(DX 26; Tr. 8).

---

those collected at 27 Fed. Proc., L. Ed. Section 62:102 (Thomson/West July 2005). Furthermore, I strongly object to the specific direction by the DOL that Administrative Law Judges have a "mind-set" to use the complainant/ parties' initials if the document will appear on the DOL's website, for the reason, *inter alia,* that this is not a mere procedural change, but is a "substantive" procedural change, reflecting decades of judicial policy development regarding the designation of those determined to be proper parties in legal proceedings. Such determinations are nowhere better acknowledged than in the judge's decision and order stating the names of those parties, whether the final order appears on any web site or not. Most importantly, I find that directing Administrative Law Judges to develop such an initial "mind-set" constitutes an unwarranted interference in the judicial discretion proclaimed in 20 C.F. R. Section 725.455(b), not merely that presently contained in 20 C.F.R. Section 725.477 to state such party names.

[2] The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] In this Decision, "DX" refers to the Director's Exhibits, "EX" refers to the Employer's Exhibits, "CX" refers to the Claimant's Exhibits, and "Tr." refers to the official transcript of this proceeding.

[4] At the hearing the Employer withdrew the following issues as uncontested: whether the claim was timely filed; whether Claimant is a miner; whether miner worked after December 31, 1969; whether Claimant worked at least 27 years in or around one or more coal mines (parties stipulated to 25 years); whether the named employer is the responsible operator; whether named employer has secured the payment of benefits; and whether the miner's most recent period of cumulative employment of not less than one year was with the named responsible operator. (Tr. 8).

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

M.S. ("Claimant") was born on July 9, 1955 and was fifty-one years-old at the time of the hearing. (DX 2, Tr. 10). He completed the seventh grade. (DX 2; Tr. 10). In 1976, Claimant married Cindy Johnson and remained married to her at the time of the hearing. (DX 2; Tr. 10). Claimant has no dependent children. (DX 2, Tr. 10). Therefore, I find that Claimant has one dependent for purposes of augmentation.

On his application for benefits, Claimant stated that he engaged in coal mine employment for twenty-seven years.[5] (DX 2, 3). Claimant's last coal mine employment was as a continuous miner operator in 2003, a position he worked for approximately seventeen years. (DX 3; Tr. 11-12). Before working as a continuous miner operator, Claimant worked the shuttle car, bolt machine, and cut machine, all of which was done around the face. (Tr. 12). Claimant described the physical requirements of a continuous miner operator to include the cutting of coal through the use of a remote box. (Tr. 11). He stood approximately ten to fifteen feet away from where the coal was actually being cut. (Tr. 11).

Claimant stated that he last worked in and around coal mines in 2003, and quit due to an on the job back injury after a rock fell on him. (DX 2, 4; Tr. 12). He underwent surgery for the injury and still has to see a back specialist once a month for treatment. (Tr. 12-13). He testified that he receives approximately $250 every two weeks in disability from this injury. (Tr. 17). Claimant also noted he had surgery on his knees in 1992 and 1998. (Tr. 13). More recently, Claimant underwent a quadruple bypass heart surgery in September of 2005. (Tr. 13-14). He testified that simply walking up a few flights of steps gives him trouble breathing, and that he often wakes up smothering. (Tr. 14). For these symptoms, he takes an inhaler every two or three days. (Tr. 14-15). He also stated that he enjoys rabbit hunting, but his breathing problems make him slow. (Tr. 16). It is his belief that even if he did not have back problems, his breathing impairment would prevent him from returning to the mines. (Tr. 17).

Procedural History

Claimant filed a claim for benefits under the Act on August 23, 2004. (DX 2). On March 16, 2005, the District Director, Office of Workers' Compensation, issued a proposed decision and order – denial of benefits. (DX 21). On March 25, 2005, Claimant requested a formal hearing. (DX 22). On June 1 2005, this matter was transferred to the Office of Administrative Law Judges. (DX 26).

[5] He stated at trial that his coal mine employment was "at least twenty-five years." (Tr. 11).

Length of Coal Mine Employment

On his application for benefits, Claimant stated that he engaged in coal mine employment for twenty-seven years. (DX 2). The Director, in a proposed decision and order dated March 8, 2003, determined that Claimant has twenty-five years of coal mine employment. (DX 21). The parties do not contest this issue. (Tr. 8). I find that the record supports this stipulation, (DX 2-6), and therefore, hold that Claimant worked at least twenty-five years in or around one or more coal mines.

Claimant's last employment was in the Commonwealth of Kentucky; (DX 3), therefore, the law of the Sixth Circuit is controlling.[6]

Responsible Operator

Liability under the Act is assessed against the most recent operator which meets the requirements of §§ 725.494 and 725.495. The District Director identified Bledsoe Coal Corp. ("Employer") as the putative responsible operator because it was the last operator to employ Claimant for a year. (DX 21). Employer does not contest this issue. (Tr. 8). After review of the record, I find that Bledsoe Coal Corp. is properly designated as the responsible operator in this case.

MEDICAL EVIDENCE

Section 718.101(b) requires any clinical test or examination to be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered. *See* §§ 718.102 - 718.107. The claimant and responsible operator are entitled to submit, in support of their affirmative cases, no more than two chest x-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two blood gas studies, no more than one report of each biopsy, and no more than two medical reports. §§ 725.414(a)(2)(i) and (3)(i). Any chest x-ray interpretations, pulmonary function studies, blood gas studies, biopsy report, and physician's opinions that appear in a medical report must each be admissible under § 725.414(a)(2)(i) and (3)(i) or § 725.414(a)(4). §§ 725.414(a)(2)(i) and (3)(i). Each party shall also be entitled to submit, in rebuttal of the case presented by the opposing party, no more than one physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, or biopsy submitted, as appropriate, under paragraphs (a)(2)(i), (a)(3)(i), or (a)(3)(iii). §§ 725.414(a)(2)(ii), (a)(3)(ii), and (a)(3)(iii). Notwithstanding the limitations of §§ 725.414(a)(2) or (a)(3), any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence. § 725.414(a)(4). The results of the complete pulmonary examination shall not be counted as evidence submitted by the miner under § 725.414. § 725.406(b).

Claimant selected Dr. Valentino Simpao to provide his Department of Labor sponsored complete pulmonary examination. (DX 8). Dr. Simpao conducted the examination on

[6] Appellate jurisdiction with a federal circuit court of appeals lies in the circuit where the miner last engaged in coal mine employment, regardless of the location of the responsible operator. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200 (1989)(en banc).

September 14, 2004. (DX 9). I admit Dr. Simpao's report under § 725.406(b). I also admit Dr. Burnett's quality-only interpretation of the chest x-ray under § 725.406(c). (DX 10).

Claimant completed a Black Lung Benefits Act Evidence Summary Form. (CX 2). Claimant designed Dr. Westerfield's September 14, 2004 x-ray interpretation,[7] and the PFT, ABG and narrative report conducted by Dr. Simpao on September 14, 2004. Claimant's evidence complies with the requisite quality standards of §§ 718.102-107 and the limitations of § 725.414 (a)(3). Therefore, I admit Claimant's evidence as designated in its summary form.

Employer completed a Black Lung Benefits Act Evidence Summary Form. As initial x-ray evidence, Employer designated Dr. Spitz and Dr. Wiot's interpretations of the September 14, 2004 film. Employer also designated Dr. Broudy's interpretation of the September 14, 2004 x-ray as rebuttal evidence. (EX 3). Next, Employer designated Dr. Simpao's PFT and ABG dated September 14, 2004 as initial evidence. Employer also designated Dr. Broudy's October 2005 medical narrative report as initial evidence. (EX 2). Employer's evidence complies with the requisite quality standards of §§ 718.102-107 and the limitations of § 725.414(a)(3).[8] Therefore, I admit Employer's evidence as designated in its summary form.

X-RAYS

Exhibit	Date of X-ray	Date of Reading	Physician / Credentials	Interpretation
DX 10	9/14/2004	09/14/2004	Westerfield, B-reader[9]	1/0 qp
DX 20	9/14/2004	12/04/2004	Spitz, B-Reader, BCR[10]	Negative
EX 1	9/14/2004	11/22/2004	Wiot, B-Reader, BCR	Negative
EX 3	9/14/2004	11/01/2005	Broudy, B-reader	Unreadable

PULMONARY FUNCTION TESTS

Exhibit/ Date	Co-op./ Undst./ Tracings	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Qualifying Results
DX 9 9/14/2004	Good/ Good/ Yes	49 71"	3.57	4.33	----	82	No

[7] This was apparently a part of the OWCP Evaluation conducted by Dr. Simpao.

[8] Claimant argues that there can be only one rebuttal of the Department-sponsored chest x-ray under § 725.414(a)(3)(ii). They are correct. However, an Employer is free to designate other readings of the Department sponsored x-ray as initial evidence.

[9] A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. This is a matter of public record at HHS National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.5l) Consequently, greater weight is given to a diagnosis by a "B" Reader. *See Blackburn v. Director, OWCP*, 2 B.L.R. 1-153 (1979).

[10] A physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. *See* 20 C.F.R. § 727.206(b)(2)(III). The qualifications of physicians are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia.

ARTERIAL BLOOD GAS STUDIES

Exhibit	Date	pCO_2	pO_2	Qualifying
DX 9	9/14/2004	38.1	94.6	No

Narrative Reports

Dr. Valentino S. Simpao[11] examined the Claimant on September 14, 2004. (DX 9). Dr. Simpao considered the following: symptomatology (two years of wheezing at rest and with exertion, dyspnea, dry cough, unrelated chest pains, orthopenea, ankle edema, nocturnal dyspnea), employment history (eight years indicated on report),[12] individual history (three years of wheezing, arthritis, and high blood pressure), no smoking history, physical examination (increase resonance in upper chest & auxiliary area), chest x-ray (1/0), PFT (normal), ABG (normal), and an EKG (inverted T waves in V2 and V3 consistent with severe ischemia versus subendocardial infarction). Dr. Simpao diagnosed pneumoconiosis based upon EKG, chest x-ray, symptomatology and the physical examination. He stated that the pulmonary impairment was mild. Dr. Simpao opined that based upon his mild pulmonary impairment, Claimant could not perform the physical labor required by his last coal mine job as running a continuous miner.

Dr. Bruce Broudy, Board certified in internal medicine and a B-reader, examined medical records and submitted a report. (EX 2). He considered the medical records from Dr. Simpao's September 14, 2004 examination of Claimant (including the x-ray report, PFT, ABG and EKG), the September 2004 x-ray report of Dr. Spitz, and an x-ray report from Dr. Baker dated April 11, 1995. He also considered twenty-five years of underground coal mine employment as a continuous miner operator, ending in 2003 due to a back injury. Dr. Broudy stated that Claimant possessed neither clinical pneumoconiosis nor legal pneumoconiosis based upon x-ray evidence and objective testing, all of which was negative. He also opined that based upon the normal PFT and ABG, Claimant possessed the pulmonary capacity to return to his job in the mines or similarly arduous work in a dust free environment. When he offered this opinion, he had not yet personally reviewed the September 14, 2004 x-ray, and noted his opinion could change after viewing the x-ray.[13]

Smoking History

At the hearing, Claimant stated that he has never smoked. (Tr. 18). The physician reports of record support Claimant's testimony. Therefore, I find that has never smoked.

[11] It was recently discovered that Dr. Simpao is not board certified in internal medicine, even though representations were made in the past that he was.

[12] The eight years are listed with Bledsoe Coal Co. (DX 9). No other employment is listed on Dr. Simpao's form. Therefore, it is not clear how many years he considered, as other portions of the form where length of coal mine employment should be notated was left blank. I also note on this form that Claimant's date of birth was listed as the same day as the examination.

[13] I note that in EX 3, Dr. Broudy found the x-ray unreadable. Therefore, it would not have altered his opinion.

DISCUSSION AND APPLICABLE LAW

Claimant's claim was filed after March 31, 1980, the effective date of Part 718, and must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, Claimant must establish, by a preponderance of the evidence, that he:

1. Is a miner as defined in this section; and

2. Has met the requirements for entitlement to benefits by establishing that he:

   (i) Has pneumoconiosis (see § 718.202), and

   (ii) The pneumoconiosis arose out of coal mine employment (see § 718.203), and

   (iii) Is totally disabled (see § 718.204(c)), and

   (iv) The pneumoconiosis contributes to the total disability (see § 718.204(c)); and

3. Has filed a claim for benefits in accordance with the provisions of this part.

Section 725.202(d)(1-3); *see also* §§ 718.202, 718.203, and 718.204(c).

Pneumoconiosis

In establishing entitlement to benefits, Claimant must initially prove the existence of pneumoconiosis under § 718.202. Claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). Pneumoconiosis is defined by the regulations:

> (a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis.
>
> (1) *Clinical Pneumoconiosis*. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) *Legal Pneumoconiosis*. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This

definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For the purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

Sections 718.201(a-c).

Section 718.202(a) sets forth four methods for determining the existence of pneumoconiosis.

(1) Under § 718.202(a)(1), a finding that pneumoconiosis exists may be based upon x-ray evidence. Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (en banc); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). I may also assign heightened weight to the interpretations by physicians with superior radiological qualifications. *See McMath v. Director, OWCP*, 12 B.L.R. 1-6 (1988); *Clark*, 12 B.L.R. 1-149 (1989).

The record contains five interpretations of one chest x-ray dated September 14, 2004, and one quality-only interpretation. Dr. Westerfield, a B-reader, interpreted the x-ray as positive for pneumoconiosis. Both Drs. Spitz and Wiot, both B-reader and BCR certified, interpreted the x-ray as negative. Dr. Broudy, a B-reader, found the film to be unreadable. Given that the two B-readers found the film to be negative, and only one to be positive, I find the September 14, 2004 x-ray to be negative for pneumoconiosis.

I have found the only x-ray on record to be negative for pneumoconiosis. Therefore, I find that the preponderance of the evidence does not support a finding of pneumoconiosis under subsection (a)(1).

(2) Under § 718.202(a)(2), a determination that pneumoconiosis is present may be based, in the case of a living miner, upon biopsy evidence. The evidentiary record does not contain any biopsy evidence. Therefore, I find that the Claimant has failed to establish the existence of pneumoconiosis through biopsy evidence under subsection (a)(2).

(3) Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found to be applicable. In this case, the presumption of § 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis. Section 718.305 is not applicable to claims filed after January 1, 1982. Finally, the presumption of § 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982. Therefore, Claimant cannot establish pneumoconiosis under subsection (a)(3).

(4) The fourth and final way in which it is possible to establish the existence of pneumoconiosis under § 718.202 is set forth in subsection (a)(4) which provides in pertinent part:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

§ 718.202(a)(4).

This section requires a weighing of all relevant medical evidence to ascertain whether or not the claimant has established the presence of pneumoconiosis by a preponderance of the evidence. Any finding of pneumoconiosis under § 718.202(a)(4) must be based upon objective medical evidence and also be supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which he bases his diagnosis. *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985). A brief and conclusory medical report which lacks supporting evidence may be discredited. *See Lucostic v. United States Steel Corp.*, 8 B.L.R. 1-46 (1985); *see also*, *Mosely v. Peabody Coal Co,.* 769 F.2d 257 (6th Cir. 1985). Further, a medical report may be rejected as unreasonable where the physician fails to explain how his findings support his diagnosis. *See Oggero*, 7 B.L.R. 1-860.

Dr. Simpao examined Claimant and it appears as though he diagnosed both clinical and legal pneumoconiosis. First, he checked that the x-ray shows evidence of coal workers' pneumoconiosis. I can find no other reference to anything he relied upon for the diagnosis of clinical pneumoconiosis. The Sixth Circuit Court of Appeals has held that merely restating an x-ray is not a reasoned medical judgment under § 718.202(a)(4). *Cornett v. Benham Coal, Inc*., 227 F.3d 569 (6th Cir. 2000). The Board has also explained that, when a doctor relies solely on a chest x-ray and coal dust exposure history, a doctor's failure to explain how the duration of a miner's coal mine employment supports his diagnosis of the presence or absence of pneumoconiosis renders his opinion "merely a reading of an x-ray . . . and not a reasoned medical opinion." *Taylor v. Brown Bodgett, Inc*., 8 B.L.R. 1-405 (1985). Therefore, I find Dr. Simpao's opinion regarding coal workers' pneumoconiosis to be neither well reasoned nor well documented. As such, I accord his opinion little weight.

Dr. Simpao also determined that based on employment history, x-ray, EKG, physical examination, and symptomatology that Claimant suffers a mild pulmonary impairment. Here, Dr. Simpao did not explain how the EKG results, physical examination, or the symptomatology reveal a finding of pneumoconiosis. *Duke v. Director, OWCP*, 6 B.L.R. 1-673 (1983)(a report is properly discredited where the physician does not explain how underlying documentation supports his or her diagnosis). Also, Dr. Simpao failed to articulate how he can diagnose a mild

impairment when he stated with regards to the ABG, "these results indicate a normal arterial blood gas." (DX 9). Finally, with the PFT results he considered, the FEV1/FVC ratio was two points above normal. As Dr. Simpao fails to clearly articulate how he can diagnose a mild pulmonary impairment based upon purely physical examination and symptomatology when objective evidence shows otherwise, I find his opinion to be unreasoned. Therefore, I accord Dr. Simpao's opinion regarding legal pneumoconiosis little weight.

Dr. Broudy stated that Claimant does not have clinical pneumoconiosis based upon the x-ray reports he read.[14] He also noted that the objective testing revealed no pulmonary impairment that would indicate symptoms of pneumoconiosis. With regards to legal pneumoconiosis, Dr. Broudy again stated that there was no objective testing which indicated even a mild pulmonary impairment, and thus Claimant could not suffer from legal pneumoconiosis. As Dr. Broudy bases his opinions upon objective evidence and clearly articulates his opinion, I find his statements to be both well reasoned and well documented. Given his superior credentials, I accord his opinion probative weight.

The evidentiary record contains one well-reasoned and well-documented narrative medical opinion from Dr. Broudy finding that Claimant does not suffer from pneumoconiosis, and one unreasoned report from Dr. Simpao stating he does. I am more persuaded by the opinion of Dr. Broudy as he relied upon objective evidence for his conclusions. Therefore, I find that Claimant has not proven by a preponderance of the evidence that he suffers from pneumoconiosis under subsection (a)(4).

Claimant has failed to establish the presence of pneumoconiosis under subsection (a)(1)-(4). Therefore, after considering all evidence of pneumoconiosis under §718.202 (a), I find that Claimant has failed to establish the presence of pneumoconiosis.

Total Disability

To be entitled to benefits under the Act, Claimant must also demonstrate that he is totally disabled from performing his usual coal mine work or comparable work due to pneumoconiosis under one of the five standards of § 718.204(b) or the irrebuttable presumption referred to in § 718.204(b). The Board has held that under Section 718.204(b), all relevant probative evidence, both like and unlike must be weighed together, regardless of the category or type, in the determination of whether the Claimant is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 B.L.R. 1-231 (1987). Claimant must establish this element of entitlement by a preponderance of the evidence. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986).

I have determined that Claimant has not established that he suffers from complicated pneumoconiosis. Therefore, the irrebuttable presumption of § 718.304 does not apply.

[14] I note that Dr. Broudy read a report of an x-ray that is not in evidence. However, he shows that the unadmitted x-ray report only serves to bolster his opinion that Claimant does not have clinical pneumoconiosis when he states "Dr. Glen Baker even read a chest x-ray as negative for pneumoconiosis." It is clear from this report he found the x-ray in evidence to be negative based upon the superior qualifications of Dr. Spitz.

Total disability can be shown under § 718.204(b)(2)(i) if the results of pulmonary function studies are equal to or below the values listed in the regulatory tables found at Appendix B to Part 718. The only PFT of record shows values above those found in Appendix B of Part 718. Therefore, I find that Claimant has failed to establish total disability under subsection (b)(2)(i).

Total disability can be demonstrated under § 718.204(b)(2)(ii) if the results of arterial blood gas studies meet the requirements listed in the tables found at Appendix C to Part 718. The only ABG study in the record failed to produce values that meet the requirements of the tables found at Appendix C to Part 718. Therefore, I find that Claimant has failed to establish total disability under subsection (b)(2)(ii).

Total disability may also be shown under § 718.204(b)(2)(iii) if the medical evidence indicates that Claimant suffers from cor pulmonale with right-sided congestive heart failure. The record does not contain any evidence indicating that Claimant suffers from cor pulmonale with right-sided congestive heart failure. Therefore, I find that Claimant has failed to establish the existence of total disability under subsection (b)(2)(iii).

Section 718.204(b)(2)(iv) provides for a finding of total disability if a physician, exercising reasoned medical judgment based on medically acceptable clinical or laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevented the miner from engaging in his usual coal mine employment or comparable gainful employment. Claimant's usual coal mine employment as a continuous miner operator required him to stand approximately ten to fifteen feet away from where the coal was actually being cut by machine five or six times per week. (Tr. 11; DX 4).[15]

The exertional requirements of the claimant's usual coal mine employment must be compared with a physician's assessment of the claimant's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). Once it is demonstrated that the miner is unable to perform his usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to § 718.204(b)(1). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988). Nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis. § 718.204(a); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (1994). All evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing by a preponderance of the evidence the existence of this element. *Mazgaj v. Valley Camp Coal Co.*, 9 B.L.R. 1-201 (1986).

Dr. Simpao's report concluded that Claimant was totally disabled due to a mild pulmonary impairment. He stated that Claimant "could not perform the physical labor required by his last coal mine job as running a continuous miner due to his pulmonary impairment." (DX 9).[16] There are multiple problems with Dr. Simpao's opinion. First, as noted in the

[15] I note there is no actual description in the record outside of this that describes the physical requirements of Claimant's employment. He left this portion of the form blank. (DX 4).

[16] Dr. Simpao also stated Claimant was totally disabled due to his back problems. (DX 9).

pneumoconiosis analysis above, Dr. Simpao has not specified objective evidence that provides the basis for his opinion. *Cosaltar v. Mathies Coal Co.*, 6 B.L.R. 1-1182 (1984). Second, he has not explained how the above normal PFT and normal ABG he considered supports a finding of total pulmonary disability. Indeed, Dr. Simpao himself described both tests as normal. (DX 9). An unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp.*, 6 B.L.R. 1-292 (1984). *See also Phillips v. Director, OWCP*, 768 F.2d (8th Cir. 1985); *Smith v. Eastern Coal Co*., 6 B.L.R. 1-1130 (1984); *Duke v. Director, OWCP*, 6 B.L.R. 1-673 (1983)(a report is properly discredited where the physician does not explain how underlying documentation supports his or her diagnosis); *Waxman v. Pittsburgh & Midway Coal Co.,* 4 B.L.R. 1-601 (1982). Therefore, based on these deficiencies, I find that Dr. Simpao's report is insufficiently reasoned and documented for the purpose of determining whether Claimant is totally disabled due to pneumoconiosis. Thus, I accord Dr. Simpao's report little weight.

Dr. Broudy opined that Claimant is not totally disabled and retains the capacity to perform his previous coal mine employment. First, Dr. Broudy considered an accurate employment history of twenty-five years. Second, Dr. Broudy noted that both the ABG and PFT were not only non-qualifying, but were perfectly normal. Based upon the objective evidence, Dr. Broudy opined that Claimant's pulmonary circulation was normal and that he suffered from no pulmonary impairment. As Dr. Broudy relies upon objective evidence and clearly articulates his opinion, I find his report to be well reasoned and well documented. Thus, based upon his advanced credentials, I accord Dr. Broudy's report probative weight.

As the burden is on Claimant to prove by a preponderance of the evidence that he is totally disabled due to pneumoconiosis, and Dr. Simpao's is the only report to so conclude, I find that Claimant has not satisfied his burden. However, even if I had found Dr. Simpao's report to be well-reasoned and well-documented, based on the objectively supported report by Dr. Broudy, I would still find that the weight of the evidence does not support a finding of total disability due to pneumoconiosis. Therefore, I find that Claimant has not proven by a preponderance of the evidence that he is totally disabled under § 718.204(b)(iv).

Claimant has failed to establish that he is totally disabled under subsection (b)(i)-(iv). Therefore, after weighing all evidence concerning total disability under §718.204 (b), I find that Claimant has failed to establish that he is totally disabled due to pneumoconiosis.[17]

---

[17] The District Director is required to provide each miner applying for benefits with the "opportunity to undergo a complete pulmonary evaluation at no expense to the miner." § 725.406(a). A complete evaluation includes a report of the physical examination, a chest x-ray, a pulmonary function study, and an arterial blood gas study. Reviewing courts have added to this burden by requiring the pulmonary evaluation be sufficient to constitute an opportunity to substantiate a claim for benefits. *See Petry v. Director*, OWCP 14 B.L.R. 1-98, 1-100 (1990)(*en banc*); *see also Newman v. Director*, OWCP, 745 F.2d 1161 (8th Cir. 1984); *Prokes v. Mathews*, 559 F.2d 1057, 1063 (6th Cir. 1977).

In this Decision and Order, I have found that Claimant's complete pulmonary evaluation by Dr. Simpao is unreasoned for purposes of determining pneumoconiosis as noted above. Also, Dr. Simpao's opinion regarding total disability was also unreasoned. However, even if this claim were remanded to the Director to provide a reasoned and documented opinion concerning the existence of pneumoconiosis and total disability, Claimant could not prevail based upon the preponderance standard. Therefore, I find that remand of this case would be futile. *Larioni v. Director, OWCP*, 6 B.L.R. 1-1276 (1984); *see*, *e.g.*, *Mullins v. Director, OWCP*, No. 05-0295 BLA (BRB, Jul. 27, 2005)(unpub.); *Bowling v. Director, OWCP,* No. 05-0327 BLA (BRB, Jul. 29, 2005)(unpub.).

Entitlement

M.S. has failed to establish either the existence of pneumoconiosis under §718.202(a) or total disability under § 718.204(b)(2). Therefore, I find that M.S. is not entitled to benefits under the Act.

Attorney's Fees

An award of attorney's fees is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for the representation and services rendered in pursuit of the claim.

ORDER

IT IS ORDERED that the claim of M.S. for benefits under the Act is hereby DENIED.

A

THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

Pursuant to 20 C.F.R. Section 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this decision, by filing notice of appeal with the Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013- 7601. *See* 20 C.F.R. §§ 725.458 and 725.459. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

A copy of a notice of appeal must also be served on Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).